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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1930.

No. 330

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY,

Petitioners,

vs.

HARDING GLASS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

HARRY P. DAILY,
JOHN P. WOODS,
Counsel for Petitioners.

BURTON-ORP-WARREN PRINTING COMPANY, CHICAGO.

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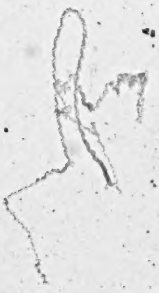

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

MAY IT PLEASE THE COURT:

A.

Summary Statement of the Matter Involved.

The court below reversed the decree of the trial court, and placed its decision upon the sole ground that a covenant in a written contract by which a customer of a natural gas utility, for a valuable consideration, agreed to take its requirements of natural gas for its two existing glass plants from the utility, at the rates fixed by public authority, so long as the utility could adequately supply same, was in partial restraint of trade, and, therefore, contrary to public policy and void, the announced

theory for such a decision being that one of the parties to the contract was a public utility, and precluded, by reason of its status, from entering into a contract even in *partial* restraint of trade. This decision of the Court of Appeals for the Eighth Circuit is in direct conflict with the decisions of other Circuit Courts of Appeal, and with the local decisions on the same matter, cited hereafter.

The controversy arose in this manner. In August, 1926, the respondent was taking the natural gas used by it at its two factories in the City of Fort Smith Arkansas, from the petitioner, Twin City Pipe Line Company. The Twin City Pipe Line Company was engaged in the business of transporting gas by pipe line from gas fields adjacent to Fort Smith, Arkansas, to that city, where it sold same as a public utility under rates fixed by public authority, both to manufacturers and to the Fort Smith Light & Traction Company, which served domestic consumers. The Fort Smith Light & Traction Company was not connected with petitioners in any way, except that it was a customer. (R. 177-178.)

The petitioner, Industrial Oil & Gas Company, was engaged solely in producing natural gas, and sold its entire production to petitioner, Twin City Pipe Line Company. The petitioners were closely allied. (R. 178.)

In the winter of 1925-1926, there had been a shortage of gas in Fort Smith, and growing out of that shortage and other controversies, litigation had ensued in which petitioners, respondent, and Fort Smith Light & Traction Company were parties.

In the decree in that consolidated cause (R. 107), the petitioner, Twin City Pipe Line Company, had obtained a judgment against respondent, Harding Glass Company, for $17,155.46, and Harding Glass Company had obtained

a judgment over against Industrial Oil & Gas Company, and Harding Glass Company's prayer for injunction, specific performance, and damages was denied. See decree (R. 107) and opinions of trial court in that litigation. (R. 113, 125.) Appeals were taken from that decree to the Court of Appeals for the Eighth Circuit.

In August, 1926, the petitioners and respondent agreed to settle their differences, and the written contract, out of which the present litigation grew, was entered into. (R. 57.) By the express terms of that contract, the petitioner, Twin City Pipe Line Company, was required to satisfy its judgment for $17,155.46 against respondent, Harding Glass Company, and Industrial Oil & Gas Company and Harding Glass Company were required to dismiss their pending appeals, and Twin City Pipe Line Company agreed to build an additional pipe line for the benefit of Harding Glass Company—the right to require such pipe line having been involved and denied by the trial court in the litigation which was being settled. (R. 124, 245.)

All covenants and agreements contained in this contract (save the covenant by which respondent agreed to take its requirements of gas from petitioner) were immediately, completely and fully performed by the parties. (R. 109-111. 140, 245.) The pipe line was built at a cost of $4,489.82. (R. 141.)

The clauses in the contract out of which the present suit grew are paragraphs four and five. (R. 139.) By the terms of these paragraphs respondent "agrees to take all its requirements of gas for its plants in the City of Fort Smith, from the Twin City Pipe Line Company, so long as the Twin City Pipe Line Company can adequately supply its requirements," at the then existing rates for industries fixed by public authority, or at

such changed rates as the public authorities may thereafter fix.

Gas was taken and furnished pursuant to the above provisions down until January 2, 1929, at which time Harding Glass Company began to take practically all of its requirements from its own subsidiary corporations. (R. 148.)

The present suit was started when Harding Glass Company had announced its intention (R. 147-148) of violating the contract and taking its own gas from its own subsidiaries. No excuse or justification for this course of conduct was offered (R. 148, 218-219) except the alleged invalidity of the contract.

This suit was brought to enjoin the respondent from violating its contract in the particulars set forth and a specific performance of the plain terms of that contract was sought and the bill concluded with a prayer for general relief. (R. 2-8.)

The trial court entered a decree enjoining respondent (R. 20) for reasons set forth in its unpublished opinion. (R. 242.) The Court of Appeals reversed this decree and remanded the cause with directions to dismiss plaintiffs' bill (R. 260-261), upon the sole ground that such a "requirements" contract was in *partial* restraint of trade, and that where one of the parties is a public utility and the other party is one of its customers, a contract even in partial restraint of trade is contrary to public policy. (R. 253.) The decree of the court below was entered March 8, 1930. (R. 260-261.) Petition for rehearing was filed in apt time (R. 261-262) and considered and denied June 26, 1930. (R. 262.) The opinion of the court below is reported as *Harding Glass Company* v. *Twin City Pipe Line Company, et al.*, 39 Fed. (2nd) 408, and is also found at (R. 253).

B.

Reasons Relied on for the Allowance of the Writ.

I.

The decision of the Court of Appeals for the Eighth Circuit in the instant case is in direct conflict with the decision of the Court of Appeals for the Tenth Circuit in the case of *Griffin* v. *Oklahoma Natural Gas Corporation*, 37 Fed. (2nd) 545, and with the decision of the Court of Appeals for the Fifth Circuit, in *Montgomery Traction Company* v. *Montgomery Light & Water Power Company*, 229 Fed. 672, which affirmed *Montgomery Light & Water Power Company* v. *Montgomery Traction Company*, 219 Fed. 963, and *Same* v. *Same*, 191 Fed. 657.

A "requirements" contract was involved both in the instant case and in the Griffin and Montgomery cases. In the case at bar and in the Griffin case the customer, for a valuable consideration, agreed to take its fuel requirements for its existing plants from a natural gas utility. In the Montgomery case the customer, a public utility, for a valuable consideration, agreed to take all electric current required by it for the operation of its street car system from an electric power utility.

The conflict between the decision in the Griffin case and the case at bar is well illustrated by the following short quotations from the opinions.

The Court of Appeals for the Eighth Circuit, in its opinion in the present case (R. 256), quoted with approval from the decision in *Coombs* v. *Burke*, 40 Cal. App. 8, the following:

> "Whatever tends to prevent competition in business impressed with a public character is opposed to public policy and is therefore unlawful." (Greenhood on Public Policy, p. 180).
>
> "Where a contract affects such character of busi-

> ness, since no restraint, however partial, can be tolerated, the court will not inquire into or consider the extent of the restriction imposed. *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396 (and other cases). As to private business, the conduct of which does not affect the public welfare, and hence involves no question of public policy, a different rule applies, under which contracts, if reasonable in their terms, will be enforced."

While the Court of Appeals for the Tenth Circuit in the Griffin case first pointed out that the City of Iola, in its "business" capacity, had entered into a contract to take from appellee's assignor "all the natural gas required by the city for fuel in the operation of its electric light and water plant," and then said in affirming a decree which enjoined a breach of that contract:

> "Counsel for the City and Griffin further contend that the contracts were void because in restraint of trade. If the restraint were reasonable, under the particular facts and circumstances of the case, the contracts are not invalid because of such restraint." *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396 (and other cases).

The contract involved in the Montgomery case is almost identical with the contract in the case at bar. It provided for the sale by an electric power company (a public utility) and the purchase by a street railway company (a public utility) of all electric current required by the street railway company for the operation of its business for a period of fifteen years. It is significant that in the Montgomery case it was not even contended that the contract was void because in restraint of trade, although the contract was attacked on a great number of other grounds. The Court of Appeals for the Fifth Circuit sustained the decree of the District Court enjoining the breach of the contract.

II.

The decision of the Court of Appeals for the Eighth Circuit in the case at bar decides an important question of general law in a way that is untenable and in conflict with the weight of authority.

The validity of contracts whereby a purchaser promises to buy his "requirements" of a commodity from a seller has been sustained in nearly every jurisdiction in the United States.

The decision of the court below announces an exception, in the case of public utilities, to the general and uniform rule applicable to requirements contracts. It holds that a requirements contract between a public utility and an abnormally large industrial user of its service is against public policy and void because in partial restraint of trade. The distinction sought to be made is contrary to reason and authority because the same reasons for upholding the validity of requirements contracts in the case of industries generally apply with equal force to the contract in question and because the contract in question is far less susceptible to attack for illegality based upon monopolistic tendencies for the reason that both the rates and service of the utility entering into the contract in question are regulated by public authority. The necessary effect of the decision is to hold any requirements contract between a public utility and any customer to be void.

The decision announces an untenable rule of law and is contrary to the weight of authority, both as to requirements contracts in general and as to similar contracts of public utilities.

III.

The decision of the Court of Appeals for the Eighth Circuit in the case at bar is in conflict with the applicable local decisions on an important question of local law.

In its opinion the court below says that the public policy to be ascertained is the public policy of Arkansas, but that no specific determination of the question is found in the statutes of the state or decisions of the Supreme Court of Arkansas. (R. 255.)

Yet the Supreme Court of Arkansas in *Fort Smith Light & Traction Company* v. *Kelley*, 94 Ark. 461, 475, held that a contract between parties both of whom were public utilities and involving the sale of gas in the City of Fort Smith, for a period of fifty years, was not void where only in *partial* restraint of trade.

The Court of Appeals has decided an important question of local law in a way which is in conflict with an applicable local decision, relied upon by the trial court in its opinion (R. 244), and not cited or discussed by the Court of Appeals in its opinion.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, for the Eighth Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain, to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 8686, Harding Glass Company, Appellant v. Twin City Pipe Line Company and Industrial Oil & Gas Company, Appellees, and that the said decree of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honor-

able Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just. And your petitioners will ever pray.

TWIN CITY PIPE LINE COMPANY,
INDUSTRIAL OIL & GAS COMPANY,
By HARRY P. DAILY,
JOHN P. WOODS,
Counsel for Petitioners.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion in the Court of Appeals for the Eighth Circuit is reported as *Harding Glass Company* v. *Twin City Pipe Line Company, et al.*, 39 Fed. (2nd) 408, and is also found at (R. 253).

The opinion of the trial court will not be reported, but is found at (R. 242).

II.

JURISDICTION.

1. The date of the decree to be reviewed is March 8, 1930. (R. 260.) Within the time provided by the then rules of the Court of Appeals for the Eighth Circuit, petitioners filed in that court their petition for rehearing, which was filed May 6, 1930. (R. 262.) The petition for rehearing was taken under advisement and thereafter denied on June 26, 1930. (R. 262.)

2. The court below, in reversing the decree of the trial court, held that a covenant in a written contract by which a customer of a natural gas utility, for a valuable consideration, agreed to take its requirements of natural gas for its two existing gas plants from the utility, at the rates fixed by public authority, so long as the utility could adequately supply same, was in partial restraint of trade and therefore contrary to public policy and void. (R. 256.)

This decision (1) is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit and with the decision of the Circuit Court of Appeals for the Fifth Circuit on the same matter, (2) is untenable and in conflict with the weight of authority on an important question of general law and (3) is in conflict with the decision of the Supreme Court of Arkansas on an important question of local law. (Rule 35, Section 5.)

3. The jurisdiction of this court is invoked under U. S. C. Title 28, Section 347 (a) formerly Section 247 of the Judicial Code as amended by the Act of February 3, 1925.

4. The following cases sustain the jurisdiction of this court in this case:

Magnum Import Co. v. *Coty,* 262 U. S. 159, 163.
Forsyth v. *Hammond,* 166 U. S. 506, 512.
Fields v. *United States,* 205 U. S. 292, 296.

III.

STATEMENT OF THE CASE.

It is believed that a full statement of the case has been given in the petition under the heading, "A Summary Statement of the Matter Involved." In the interest of brevity, therefore, the statement will not be repeated here.

SPECIFICATION OF ERRORS.

1. The lower court erred in holding that a contract between a customer of a public utility and the utility, by which the former agreed to take its requirements of natural gas for its existing plants from the utility, is contrary to public policy and void.

SUMMARY OF ARGUMENT.

Point One.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.

Point Two.

THE DECISION OF THE COURT BELOW DECIDES AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY THAT IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

Point Three.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS ON AN IMPORTANT QUESTION OF LOCAL LAW.

ARGUMENT.

POINT ONE.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.

The court below, in holding the contract void, puts its decision on the ground that one of the parties is a public utility, and therefore, for that reason alone, precluded from entering into a contract which can be construed as being even in partial restraint of trade.

A diametrically opposite conclusion is reached by the Court of Appeals for the Tenth Circuit, in passing upon an essentially similar natural gas "requirements" contract between a public utility and the City of Iola, Kansas, one of its customers.

Griffin, et al. v. *Oklahoma Natural Gas Corporation*, 37 Fed. (2nd) 545.

That court affirmed a decree which enjoined the customer from taking from another its natural gas requirements for the operation of its municipal plant and for resale to the inhabitants of the city, holding in answer to the plea that the contract was void because in restraint of trade, that the contract was reasonable, and therefore not invalid, even though in *partial* restraint of trade.

The petition for certiorari contains short quotations from the opinion of the court below, and from the opinion of the Court of Appeals for the Tenth Circuit, in the *Griffin case, supra*, which sharply illustrate the conflict between the two decisions on the same matter.

The two cases cannot be differentiated on the facts. An analysis of the undisputed facts, in the two cases, simply accentuates the conflict between these decisions on the question of law.

In both cases a contract was entered into with a public utility for the fuel requirements of an existing industrial plant.

Both contracts were supported by an adequate consideration. In the instant case, that consideration was not simply the mere agreement on the part of the utility to furnish the fuel. The important consideration, which supported the covenant of the customer, was the settlement of the then pending litigation between the parties. The petitioner, Twin City Pipe Line Company, pursuant to the covenants contained in the contract requiring it to do so (R. 139), satisfied a judgment which it had obtained against the customer amounting to more than $17,000 (R. 109), and in addition thereto, and pursuant to the terms of the contract, built a pipe line at an expense of over $4,000 (R. 241), which the trial court in the previous litigation had held it was not obligated to build (R. 245), and the petitioner, Industrial Oil & Gas Company, dismissed its pending appeal. (R. 111-112.) The adequacy of this consideration cannot be questioned. The very terms of the contract, and the character of consideration, moving from the utility, show that the contract was entered into primarily for the purpose of settling pending litigation between the parties, and for the protection of necessary investment of the utility to serve this particular and abnormal customer, and that it was not part or parcel of any scheme by which the utility sought to tie up industries generally in order to avoid competition. There is no evidence in the record that any similar contract was entered into with other industries.

Carter-Crume Co. v. *Peurung*, 86 Fed. 439.

The contract in the instant case was made between the utility and a window glass company, while the contract in the Griffin case was made between a utility and a municipal corporation. But the opinion in the Griffin case makes plain that the city entered into the contract in that case in its "business" and not in its "governmental" capacity, so there is no distinction between the cases on this ground.

In the Griffin case the utility spent large sums of money after the contract was signed in putting itself in position to furnish the gas. In the instant case one petitioner satisfied a $17,000 judgment and built a $4,000 pipe line, while the other has spent over $70,000 in drilling new gas wells to the end that respondent might be adequately supplied. (R. 152-153.)

The contracts in the Griffin case ran for a term of five years, but further provided that the utility should not be required to furnish gas nor be liable for shortage caused by failure of gas in the territory from which the utility obtained its supply, or because of failure of the pressure of the gas wells.

The contract in the case at bar was for as long as the utility could adequately supply the gas. The industry had been buying gas from the utility for a number of years and knew its source of supply (R. 155-157), and the testimony of respondent's own president makes plain that a contract for a shorter period of time, in view of the improvements which it contemplated, and the character of manufacturing in which it was engaged, would have been of no value to it. (R. 216-219.)

In other words, no window glass manufacturer would *contract* for gas for a less period of time than the life of the gas field, and in view of the known exhaustibility of gas fields, it is difficult to see how the contract could

be condemned as unreasonable on this ground. The subject matter of the contract, natural gas, when taken in connection with the character of business in which the manufacturer was engaged, demanded a contract for the life of the gas field.

The opinion of the court below emphasizes throughout the inability of a public utility to enter into a contract, whether with its customers or others, which involves any restraint of trade, however partial, while a "requirements" contract, such as is involved in both cases, is recognized as reasonable and valid by the Court of Appeals for the Tenth Circuit in the Griffin case, and no distinction is made in that case, because the person supplying the customer happens to be a public utility.

The decision of the court below is also in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Montgomery Traction Co.* v. *Montgomery Light and Water Power Co.*, 229 Fed. 672. The contract involved in this case obligated the traction company to purchase from the power company "exclusively for the period of fifteen years * * * such direct electrical current * * * as it may require for propelling, lighting and heating its passenger and freight cars" and other purposes, in and about the City of Montgomery, Alabama. The traction company attempted to discontinue receiving electrical current from the power company and take it from another source. The power company instituted suit to enjoin the traction company from receiving current from any person other than the power company. A demurrer to the bill was overruled in *Montgomery Light and Water Power Co.* v. *Montgomery Traction Company*, 191 Fed. 657, and a decree was granted perpetually enjoining the traction company from taking electrical current from any person other than the power company during the term

covered by the contract and so long as the power company performs its part of the contract. The style of the case is *Montgomery Light and Water Power Co.* v. *Montgomery Traction Co.*, 219 Fed. 963. The decree was affirmed by the Circuit Court of Appeals Fifth Circuit, in the case above referred to.

The contract in the Montgomery case is almost identical with the case at bar and the relief granted by the decree in that case is in accord with the views expressed in the opinion of the trial court in the case at bar.

We submit, therefore, that the decision of the court below is in direct conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the Griffin case and with the decision of the Circuit Court of Appeals for the Fifth Circuit in the Montgomery case.

Point Two.

THE DECISION OF THE COURT BELOW DECIDES AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY THAT IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

The validity of contracts whereby a purchaser promises to buy his "requirements" of a commodity from a seller, has been sustained in nearly every jurisdiction in the United States. Indeed, it would be difficult to find a principle of law more definitely established than the doctrine applicable to the validity of requirements contracts. Requirements contract such as we have in the case at bar and in the Griffin and the Montgomery cases are commonplace. Manufacturers ordinarily and commonly contract for the purchase of their requirements of fuel or material in order to insure themselves an adequate and sufficient supply at all times. Without the assurance of distribution which such contracts give, it

would be extremely hazardous for sellers to carry on extensive development of natural resources or to expand equipment for manufacturing. To vitiate such contracts is to condemn a well recognized business practice without promoting or protecting any public interest.

The following cases uphold the validity of requirements contracts:

United States v. *Purcell Envelope Co.* (1919), 249 U. S. 313.

Brawley v. *United States* (1878), 96 U. S. 168.

Willard, Sutherland & Co. v. *United States* (1923), 262 U. S. 489.

Smoot v. *United States* (1915), 237 U. S. 38.

Pittsburgh Plate Glass Co. v. *H. Neuer Glass Co.* (1918), 165 C. C. A. 61; 253 Fed. 161.

Loudenback Fertilizer Co. v. *Tennessee Phosphate Co.* (1903), 58 C. C. A. 220; 121 F. 298.

Lima Locomotive & Machine Co. v. *National Steel Castings Co.* (1907), 83 C. C. A. 593; 155 Fed. 77.

Manhattan Oil Co. v. *Richardson Lubricating Co.* (1902), 51 C. C. A. 553; 113 Fed. 923.

Marx v. *American Malting Co.* (1909), 95 C. C. A. 80; 169 Fed. 582.

Rockhill Iron & Coal Co. v. *City of Taunton* (1921), 273 F. 96.

National Pub. Co. v. *International Paper Co.* (1920), 269 F. 903.

Texas Co. v. *Pensacola Maritime Corp.* (1922), 279 Fed. 19. (See also 292 F. 61; 300 F. 51.)

Mills-Morris Co. v. *Champion Spark Plug Co.* (1925), 7 Fed. (2nd) 38.

Sterling Coal Co. v. *Silver Spring Bleaching & Dyeing Co.* (1908), 89 C. C. A. 520; 162 Fed. 848.

Conley Camera Co. v. *Multiscope & Film Co.* (1914), 216 Fed. 892.

Diamond Alkali Co. v. *P. C. Tomson & Co., Inc.* (1929), 35 Fed. (2nd) 117.

Ehrenworth v. *George F. Stuhmer & Co., Inc.* (1920), 229 N. Y. 210; 128 N. E. 108.

Lone Star Gas Co. v. *Municipal Gas Co.* (1928), 117 Tex. 331; 3 S. W. (2nd) 790.

Cox, Inc. v. *Humble Oil & Refining Co.* (1929), Comm. of App. Tex. 16 S. W. (2nd) 285.

Big Four Ice & Cold Storage Co. v. *Williams* (1928), Court Civ. App. Tex. 9 S. W. (2nd) 177.

Minnesota Lumber Co. v. *Whitebreast Coal Co.* (1895), 160 Ill. 85; 43 N. E. 774.

Jackson Hill Coal & Coke Co. v. *Merchants' Heat & Light Co.* (1923), 193 Ind. 422; 140 N. E. 532.

C. G. Blake Co., Inc. v. *W. R. Smith & Son, Limited* (1926), 147 Va. 960; 133 S. E. 685.

Hendler Creamery Co. v. *Lillich* (1927), 152 Md. 190; 136 Atl. 631.

Elk Refining Co. v. *Falling Rock Cannel Coal Co.* (1922), 92 W. Va. 479; 115 S. E. 431.

Home Gas Co. v. *Mannington Co-Operative Window Glass Co. et al.* (1907), 63 W. Va. 266; 61 S. E. 329.

Albany Power & Mfg. Co. v. *City of Albany* (1909), 133 Ga. 375; 65 S. E. 886.

O'Bryan v. *Mengel Co.* (1928), 224 Ky. 284; 6 S. W. (2nd) 249.

The decision of the court below is in direct conflict with the weight of authority on the question of the validity of requirements contracts. It announces a new

doctrine applicable only to one class of requirements contracts—the requirements contracts of a public utility. It excepts such contracts from the application of the universally recognized rule sustaining the validity of requirements contracts, on the sole ground that such contracts, when made by a public utility for the sale of its commodity are in partial restraint of trade and therefore against public policy and void.

Undoubtedly, all requirements contracts have some tendency to restrain the absolute freedom of trade. A manufacturer using coal for fuel in his operations agrees to buy five hundred tons during the winter of 1930; such a contract might by a process of reasoning be said to be in partial restraint of trade because it would prevent a competitor of the seller from supplying a part of the coal, yet it would hardly be urged that such a contract is illegal because in partial restraint of trade. Certainly the character and effect of such a contract would not be changed merely because the seller was a public utility and the commodity sold was gas or electricity instead of coal. Yet the court below makes a distinction in the application of the doctrine application to such contracts. This distinction is not justified in reason (1) because it is apparent that a contract of this character between a public utility and an abnormally large industrial user of its service is reasonably required as a matter of sound business in order to protect the large investment that the utility must make in order to serve adequately such a customer; otherwise the customer is left free to abandon at any time the use of the investment in plant and line capacity or the development of gas producing territory (as in the case at bar) made specially to serve it, and it is apparent that such a course must lead to business disaster or at least must seriously cripple the utility in it ability to serve properly the gen-

eral public, and (2) because it is apparent that a "requirements" contract between a public utility and a large industrial user of its service is far less susceptible to attack for illegality based upon monopolistic tendencies than similar contracts of purely private corporations where, as in the case at bar, the rates and service of the public utility are regulated by public authority. Under Act 124 of the Acts of Arkansas 1921 (applicable section quoted in Appendix), the City Commission of the City of Fort Smith is vested with the power to make all reasonable and proper rules and regulations with reference to the operations of the Twin City Pipe Line Company within the municipality (including the power to fix and regulate rates and to order the performance of any duty devolving on it under its franchise or contracts); outside the corporate limits of the municipality the power of regulation is vested in the Arkansas Railroad Commission. Private corporations are, of course, not subject to such regulation. It is impossible to divorce the business of a public utility from business considerations logical to the conduct of all business.

By the terms of the contract, involved in the present case, the Pipe Line Company did not agree not to sell gas to others. It did not agree to limit or to restrict its business as a public utility. The gas, to be furnished under the terms of the contract, was to be furnished at the then legally established rates, or at such rates as the public authorities might thereafter establish. The Harding Glass Company did not agree that it would not build other plants, or in the event that it did do so, did not agree to take its gas for such new plants from petitioner. It simply agreed to buy its requirements for its existing plants from the petitioner.

The court below in support of its opinion cites *Coombs v. Burke*, 40 Cal. App. 8, on the proposition that where

a contract affects a business impressed with a public interest, no restraint, however, partial, will be tolerated. That case involving an action to recover $330 on contract, was decided in 1919 by an intermediate court of the State of California (District Court of Appeals, Second District, Division 1), and has never been cited or approved by any court (other than the court which rendered the decision) except by the Circuit Court of Appeals of the Eighth Circuit in the case at bar. The authorities cited in the opinion in that case in support of the doctrine announced are clearly distinguishable and do not sustain the conclusions reached.

The remaining authorities cited by the court below in support of its opinion undoubtedly sustain the general principles of law in respect to monopoly and combinations in restraint of trade set forth therein. We contend, however, that the general doctrines announced in those cases are not determinative of the case at bar. None of the cases cited, with the possible exception of the Coombs case, involved a "requirements" contract such as is presented by the case at bar.

"Requirements" contract have been sustained by this court in *United States* v. *Purcell Envelope Co.* (*supra*), *Brawley* v. *United States* (*supra*), *Willard Sutherland & Co.* v. *United States* (*supra*) and *Smoot* v. *United States* (*supra*). None of the authorities (except the Coombs case) has held a "requirements" contract between a public utility and one of its customers invalid because in partial restraint of trade, while the Circuit Court of Appeals for the Tenth Circuit, in *Griffin, et al.* v. *Oklahoma Natural Gas Corporation* (*supra*), the Circuit Court of Appeals for the Fifth Circuit in *Montgomery Traction Co.* v. *Montgomery Light & Water Power Co.* (*supra*), and the Commission of Appeals (Section B)

of Texas, in *Cox, Inc.* v. *Humble Oil & Refining Co.* (*supra*), have upheld the validity of such contracts.

We submit, therefore, that the decision of the court below is untenable and is not sustained by reason or authority.

Point Three.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS ON AN IMPORTANT QUESTION OF LOCAL LAW.

The court below, in its opinion, said:

> "The public policy to be ascertained is the public policy of Arkansas. *Northwestern Life Insurance Co.* v. *Johnson*, 254 U. S. 96."

And

> "No specific determination is found in the statutes or decisions of the Supreme Court of Arkansas applicable to the exact situation."

But it must be conceded that the Supreme Court of Arkansas has said that contracts between private individuals are valid when only in *partial* restraint of trade. The case of *Webster* v. *Williams*, 62 Ark. 101, is cited by the court below. In that case a contract of a physician to retire permanently from the practice of medicine in a given city was upheld against the plea, that such a contract was in unreasonable restraint of trade. The facts in that case and the opinion of the court, are on all fours with the facts and the opinion in the case of *Mills* v. *Ressler*, 87 Kansas 549, cited by the Court of Appeals for the Tenth Circuit, in the Griffin case.

In the case of *Keith* v. *Herschberg*, 48 Ark. 146, a contract which gave to a merchant the exclusive right to sell a particular character of goods in the town of Boone-

ville, was upheld against the contention that it was in unreasonable restraint of trade, and therefore, void.

These two cases are cited with approval by the Supreme Court of Arkansas, in *Fort Smith Light & Traction Company* v. *Kelley*, 94 Ark. 461. This case was relied upon by the trial court in its opinion (R. 244-245), but was ignored by the Court of Appeals for the Eighth Circuit in its opinion. The 6th syllabus of that case (page 462) reads as follows:

> "A contract whereby a person agrees not to supply natural gas in a certain city is only in partial restraint of trade, and, is therefore, not void."

In that case the contract was between two parties, both of whom were engaged in the public business of supplying natural gas. It was contended by Kelley that, "If the contract did undertake to exclude defendants from Fort Smith for forty-nine years, it would be a restraint of trade and competition, against public law and policy, and unenforceable."

The Supreme Court of Arkansas answered this contention (page 475) in part, as follows:

> "But, should we be mistaken in holding that the contract is not one in restraint of trade, then we are of the opinion that at most, it could only be a contract in *partial* restraint of trade. *Under all the authorities and our own decisions, such contracts, when reasonable, are not against public policy, and therefore are not void. Keith* v. *Herschberg Optical Co.*, 48 Ark. 146; *Webster* v. *Williams*, 62 Ark. 101."

Further along in the opinion the Supreme Court of Arkansas said:

> "That courts of chancery will grant relief by injunction to prevent a breach of contract in partial restraint of trade is well settled."

Here was a contract which involved exactly the same public business which is involved in the present case.

It was a contract which involved supplying gas to all of the inhabitants of the City of Forth Smith, and the contract ran for a period of forty-nine years. Yet, the Supreme Court of Arkansas, applying the same rule to this contract that it had previously applied to contracts between individuals, held that the contract was not invalid, because it was only in *partial* restraint of trade.

In the later case of *Kimbrough* v. *Wells*, 112 Ark. 126, 130, the case of *Fort Smith Light & Traction Co.* v. *Kelley, supra*, and the case of *Webster* v. *Williams, supra*, were cited with approval, in upholding a contract which was in partial restraint of trade.

The test, and the only test which the Supreme Court of Arkansas has laid down is the reasonableness of the contract. This is the same rule announced by the Court of Appeals for the Tenth Circuit, in the Griffin case. No distinction is made by the Supreme Court of Arkansas by reason of the fact that one of the parties to the contract is a public utility. In announcing a contrary rule, the court below has adopted a public policy for the State of Arkansas, in the federal courts, which is contrary to the public policy enforced in the state courts.

The statutes of Arkansas authorize municipalities to grant exclusive franchises for gas, electric light and other utilities. C. & M. Digest, 7492 (quoted in Appendix). The validity of this section has been recognized in *City of Eldorado* v. *Coates*, 175 Ark. 289, and *Cap F. Bourland Ice Company* v. *Franklin Utilities Company*, 180 Ark. 770. Similar statutes relative to toll bridges and ferries have been upheld by that court in *McClintock* v. *Bovay*, 164 Ark. 482, and *McClintock* v. *White River Bridge Company*, 171 Ark. 943.

Some point is made of the fact that the Harding Glass Company is a very large consumer of gas, but the amount

of gas involved is nothing as compared with the amount involved in the case of *Fort Smith Light & Traction Company* v. *Kelley, supra.* But in addition thereto, it is the very fact, that the Harding Glass Company is a tremendous consumer of gas, which makes the contract reasonable. The Twin City Pipe Line Company, prior to the signing of this contract, and at the present time holds itself out as a public utility, serving manufacturers in the City of Fort Smith. Any manufacturer, by paying the rates fixed by public authority, has the right to demand a connection, and to take as much or as little gas as he pleases.

The Twin City Pipe Line Company, as a public utility, is required to use ordinary diligence in providing reasonable facilities, and a reasonable supply of gas for its customers. But it is not an insurer of that supply. If one of the manufacturers, using an enormous quantity of gas, has the right to take its gas, or not, at will, from the utility, as it undoubtedly does in the absence of a contract, then the public utility through necessity will be driven to make only reasonable exploration and developments in advance of present needs. Financial considerations, if nothing else, would prevent the utility from developing or contracting for a supply of gas far in advance of present needs, when such a large customer could quit it at will. This particular customer, according to the undisputed testimony of its own president, needs natural gas for its existing plants for a long period of time. These two parties, for a valuable consideration, contracted for such requirements during the life of the gas field, to be paid for at the rates fixed by public authority. The results of the contract was an expansion of the business of the manufacturer, and an immediate development of the gas-producing territory, far in advance of present needs. The necessary effect

of this was beneficial both to the public and to the parties. Having secured the benefit of the contract, the manufacturer then decided to take its own gas from its own subsidiaries or from the public utility, as might be most convenient to it from day to day. (R. 148-149.)

The public policy of Arkansas, as announced by the Supreme Court of that state, does not require that any such flagrant breach of contract shall be tolerated.

Conclusion.

In *Steele* v. *Drummond*, 275 U. S. 199, 205, this court announced that it was a matter of great public concern, that freedom of contract be not lightly interfered with, and that it is only in clear cases that contracts will be held void, or declared illegal, because of public policy. And in the very recent case of *Patton* v. *United States*, 281 U. S. 276, 306, it was stated:

> "The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and unless deducible in given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection."

It is, therefore, respectfully submitted that the petition for certiorari should be granted, and that upon a final hearing the decree of the court below should be reversed and the decree of the trial court should be affirmed.

By Harry P. Daily,
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Counsel for Petitioners.

Appendix.

Acts of Arkansas 1921 (General) Act 124, Section 6.

"Section 6. That section 8 of the said Act No. 571 of the General Acts of the General Assembly of the State of Arkansas of 1919, above more particularly referred to, be and the same is hereby amended to read as follows:

"Section 8. Authority to Establish Rates. The commission shall have the power, after reasonable notice and after full and complete hearing, to enforce, originate and establish, modify, change, adjust and promulgate tariffs, rates, joint rates, tolls and schedules for all public service corporations, companies and utilities and all rates and regulations with reference thereto and orders directing the performance of any duties devolving on said company, utility, common carrier or public service corporation under the terms of this act; and whenever the commission shall, after notice and hearing, find any existing rates, tolls, tariffs, joint rates or schedules unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of law, the commission shall, by an order, fix reasonable rates, joint rates, tariffs, tolls, charges or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory, inadequate or otherwise in violation of any of the provisions of this law; provided, however, that nothing herein shall authorize said commission to make any rule, regulation or order whatever to be effective within the limits of any municipality of this State with reference to any tariff, rate, toll, schedule, duty or action of any public service corporation, company or public utility operating within such municipality as a street railroad, telephone company, gas company, pipe line company for transportation of oil, gas or water, electrical company, for the generation or distribu-

tion, sale or supply of electricity for heat, light or power, water company or hydro-electric company, it being the intention of this act, hereinafter more particularly expressed, to confer upon the municipal councils and city commissions of this State, jurisdiction as to such matters, so far as same are effective within the limits of any municipality of this State."

Section 7492, Digest of the Statutes of Arkansas, Crawford & Moses, 1921:

"SEC. 7492. Exclusive privileges. For the purpose of providing water, gas, electric light, heat, cold storage or street railroad, the mayor and council may contract with any person or company to construct and operate such utilities, and may grant to such person or company, for a time which may be agreed upon, the exclusive privilege of using the streets and alleys of such city for such purposes and may authorize such person or company to assign such contract or privileges and transfer such utility to any other person or company having authority to conduct any such business in the city, with full authority to the assignee or transferee to enjoy and use the same in like manner and to the same extent as the assignor could have done; and all such assignments and transfers which have heretofore been made, are hereby ratified and approved. Act March 19, 1925, p. 692."